87-375

No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

GEOFFREY MONGE, AS SHERIFF OF SARASOTA COUNTY, FLORIDA, MAX FRIMBERGER, AS CAPTAIN OF THE SARASOTA COUNTY JAIL, and THE CHAIRPERSON OF THE SARASOTA COUNTY BOARD OF COUNTY COMMISSIONERS,
Petitioners,

v.

MICHAEL DENNIS STRAUB,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Whether the court of appeals erred when it held that a non-indigent prisoner, who chooses not to employ counsel, must be afforded access to a law library to defend a civil forfeiture action.

LIST OF PARTIES

The caption of the case contains the names of all parties.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Geoffrey Monge, Sheriff of Sarasota County, Florida, Max F. Frimberger, Captain of the Sarasota County Jail, and the Chairperson of the Sarasota County Board of County Commissioners hereby petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-17a) is reported at 815 F.2d 1467. The opinion of the district court (App., *infra*, 18a-26a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 5, 1987. On July 15, 1987, Justice White extended the time for filing a petition to and including September

2, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment of the United States Constitution (U.S. Const., amend. XIV) provides in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

1. On March 2, 1982, respondent, Michael Dennis Straub, was arrested and charged under Florida law with the armed robbery of a bank. Respondent was incarcerated in the Sarasota County Jail pending trial until his transfer to a Florida State prison in September 1982 after he was convicted. During his incarceration and prior to his plea in the criminal case, civil forfeiture proceedings were brought concurrently in state court against respondent's automobile which was used in connection with the robbery.

After his arrest, respondent submitted to the state trial court an affidavit of insolvency stating that he had no assets or income. On the basis of that affidavit, an Assistant Public Defender was appointed to represent him in his state criminal case.[1] Contrary to respondent's affidavit, he was at that time receiving at least $1200 per month in income from the Veterans Administration. Straub, Tr. 33, 90, 127.[2] Further, in his deposition, re-

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[1] The Public Defender did not represent respondent in the civil forfeiture proceeding.

[2] Since the trial transcript of respondent's testimony was not marked with a volume number, citations to his testimony before the district court will be as follows: "Straub, Tr. ——." Other citations to the transcript will refer to the specific volume and page numbers.

spondent revealed that prior to the robbery he was receiving G.I. Bill benefits of $422 or $511 per month. *Id.* at 52. Respondent's bank records show that he had $1375 on deposit with the Life Savings and Loan of Clearwater on the day of his arrest and made deposits totalling $2190 during one of the months preceding his arrest. *Id.* at 48, 84. Finally, during the course of his incarceration, respondent saved $3000 and also purchased a $2100 car for his wife. *Id.* at 97.

While incarcerated in the Sarasota County Jail, respondent asked to use a law library. He indicated that he wanted to assist his Public Defender in the defense of his criminal case and wanted to prepare a defense to the civil forfeiture action.[3] Because the Sarasota County Jail had no law library, inmates were required to obtain a court order to allow them to be taken from the jail to the county law library. I Tr. 24. Respondent's attorney in the criminal case moved for such a court order. I Tr. 101, 109-10. In addition, during a hearing in the civil forfeiture case, respondent requested to use the law library. Straub, Tr. 27. The state court apparently did not rule on those requests and neither respondent nor his counsel renewed the requests. App., *infra*, 2a-3a. At a subsequent trial which respondent attended, his car was ordered forfeited to the State of Florida by the court.

2. The present action arises from consolidated cases respondent brought in the United States District Court for the Middle District of Florida against petitioners. Respondent claimed damages under 42 U.S.C. § 1983 for the alleged violation of his right of access to the courts

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[3] Respondent's Public Defender was not able to represent him in the civil forfeiture proceeding. I Tr. 92-93. The Public Defender did refer respondent to private attorneys who were willing to consider taking the case with a long-term payment arrangement. I Tr. 93. Respondent chose, however, to represent himself.

mandated by this Court's decision in *Bounds v. Smith*, 430 U.S. 817 (1977). First, he alleged denial of access to a law library to aid his Public Defender and second, he claimed denial of access to a law library to prepare a defense to the civil forfeiture proceeding. Respondent was initially allowed to proceed *in forma pauperis* in the district court. But, upon learning of respondent's financial resources, the district court revoked his *in forma pauperis* status. Order, October 1, 1985. At the trial of his Section 1983 action, respondent was represented by retained counsel.

After trial, the district court concluded that respondent had been denied his right of access to the courts in his civil forfeiture proceeding.[4] Notwithstanding its own decision to deny respondent *in forma pauperis* status, Order, October 1, 1985, the court found that he was indigent, relying solely on the state court's appointment of a Public Defender and stating that "the defense has not shown that [respondent] lied to the State court judge or even that that judge was unaware of his income." App., *infra*, 24a.[5] The court found respondent indigent

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[4] Since respondent was represented by counsel in his criminal case, the district court held that he was not denied his right of access to the courts in that proceeding. App., *infra*, 21a-22a.

[5] Notwithstanding the district court's statement, it *was* clear that the affidavit of insolvency filed with the State court was false. Respondent simply lied to the court through the affidavit, filed pursuant to § 27.52(1) of the Florida Statutes ("Any accused person claiming indigency shall file with the court an affidavit which shall contain the factual information required in subsection (2)."). Respondent signed an affidavit indicating that he had no income or assets. Straub, Tr., at 88-90. The Florida Statutes, in pertinent part, provide that if a "defendant owns cash in excess of $500," or if the defendant's "gross income exceeds $100 per week plus $20 per week for each of the first two dependents of the defendant and $10 per week for each additional dependent" then there should be a "presumption that the defendant is not indigent." Fla. Stat. § 27.52(2)(b) (1985). The court may, as the district court noted (App., *infra*, 24a), consider other factors. Fla. Stat.

even though it noted that respondent "was not the most credible of witnesses on the issue of his income." App., *infra*, 24a.

The district court also ruled that, even if its indigency determination were incorrect, it would nonetheless hold that respondent was constitutionally entitled to access to a law library. The court rejected the defendants' argument that *Wilson v. Zarhadnick*, 534 F.2d 55 (5th Cir. 1976), conditioned the state's constitutional burden of accommodating a prisoner's right of access to the courts (*i.e.*, access to a law library or other legal assistance) on a factually supportable finding that the prisoner is indigent. The court reasoned that such a rule is contrary to *Bounds v. Smith*, *supra*, that the pertinent discussion in *Wilson* was mere dictum and that petitioners' proposed rule would be unworkable. Accordingly, respondent was awarded $3,000 in damages and attorney's fees. App., *infra*, 25a-26a.

The court of appeals affirmed. App., *infra*, 1a-17a. Despite the clear and uncontroverted evidence to the contrary, the court of appeals held first that the ruling below—that respondent was indigent—was not clearly erroneous. App., *infra*, 4a. In the alternative, the court announced that "even if [respondent] were not indigent, he was still entitled to access to the courts through the use of a library or other legal materials furnished by the county." App., *infra*, 5a. The court of appeals reasoned:

> The state cannot force a person with financial means, who would otherwise not hire a lawyer, to hire a lawyer because of incarceration, any more than the state can deny access to an indigent.

App., *infra*, 5a.

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§ 27.52(2)(c) (1985). Nevertheless, it is clear that, absent petitioner's false affidavit, the state court should not have appointed counsel for him.

The court held that *Bounds* placed an "affirmative obligation" upon the states to insure inmates meaningful access to the courts through provision of legal research materials and "establish[ed] no exception for nonindigent inmates." App., *infra*, 7a. Thus, all prisoners within the jurisdiction of the Eleventh Circuit must be afforded "access to the courts"—including access to a law library or "adequate assistance from individuals trained in the law"—regardless of their wealth and their ability to obtain access through attorneys. App., *infra*, 6a, quoting *Mann v. Smith*, 796 F.2d 79, 83 (5th Cir. 1986). The court of appeals also held that this "right" extends to civil proceedings, such as the forfeiture action against respondent's automobile. App., *infra*, 7a-8a.

Judge Hill concurred, but he argued that the court should have rested its decision solely on the issue of Straub's indigency.[6] Judge Hill claimed that the majority impermissibly read *Bounds* as giving a *non-indigent* prisoner the choice of whether to hire an attorney or proceed *pro se* at the states' expense. According to Judge Hill, the *Bounds* decision's guarantee of "access to the courts" is more appropriately viewed as "an equalizer." App., *infra*, 11a.

> [*Bounds*] requires that access be given where none was available. This does not mean, necessarily, that a prisoner with ample financial resources to retain a lawyer has insufficient access to the courts unless he or she also has access to a law library. The state may not have to provide everyone sued or indicted with a full set of law books in case he or she might wish to proceed *pro se*.

App., *infra*, 11a-12a.

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[6] Judge Hill specifically noted that the majority's holding that all prisoners are entitled to access for all civil actions was not "harmless dicta" but rather an expansion of the *Bounds* holding "in two important ways, neither of which is justified by the facts of this case." App., *infra*, 9a.

REASONS FOR GRANTING THE PETITION

The Eleventh Circuit in this case has expanded significantly the federally imposed burden on state and local governments to provide inmates with access to a law library if they are in custody in Florida, Georgia or Alabama.[7] That court has now held that, as a matter of constitutional right, all state prisoners—regardless of wealth or adequacy of representation—are entitled to access to law libraries and other materials in all litigation in which those inmates are involved.[8] This ruling is inconsistent with the precedents of this Court, is in conflict

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[7] Although the court of appeals did not overturn the district court's clearly erroneous finding that respondent was indigent, the court of appeals' broad "alternative" holding clearly is not mere dicta. The court unequivocally held that a prisoner with financial means must be provided with some form of legal assistance if he chooses not to employ counsel. App., *infra*, 5a-6a. Moreover, the court's use of the alternative holding as a basis for announcing a broad rule of general applicability should not be insulated from further review in this case. It is clear that respondent was *not* indigent at the time he was denied access. If the Court had properly addressed the issue, instead of merely asserting that the ruling of the district court was not "clearly erroneous," then it would have been required to consider the broader issue. Thus, although the "clearly erroneous" determination obviously is not by itself worthy of review by this Court, it should not be an obstacle to review of the fundamentally important ruling on the alternative issue decided in this case.

[8] For smaller state and local prisons the burden of the ruling below will be manifestly onerous. State and local governments must either incur the expense of establishing a law library or face the expense, administrative inconvenience, and possible threat to the public safety of taking prisoners to law libraries outside the prison. Thus, it is important that this Court decide whether this burden is constitutionally mandated for non-indigent prisoners in all civil cases. Indeed, Sarasota County presently is faced with an order to pay the legal fees of a non-indigent who did not obtain counsel even though the trial court found he had $40,000-$50,000 dollars available in an I.R.A. *State of Florida v. Haskell*, No. 86-0830-CF-A-N1 (12th Jud. Cir. March 4, 1987) (order requiring payment of defense fees).

with the position of at least four other courts of appeals and imposes an unnecessary security risk and financial burden on state and local governments.

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT.

In *Bounds v. Smith*, 430 U.S. 817 (1977), this Court affirmed an order requiring "the responsible State officials to submit a proposed plan for implementing the State's obligation to provide adequate library facilities for the use of *indigent prisoners* seeking to file *pro se habeas* or *civil rights* actions. . . ." *Smith v. Bounds*, 538 F.2d 541, 542 (4th Cir. 1975), *aff'd*, 430 U.S. 817 (1977) (emphasis added). *Bounds* reaffirmed the long-standing principle, which is recognized and respected by the petitioners, that inmate access to the courts must be "adequate, effective, and meaningful." 430 U.S. at 822.[9] In particular, *Bounds* held that the central inquiry in determining whether the law library in question was necessary to ensure adequate access was "whether law libraries . . . are *needed* to give prisoners a *reasonably adequate opportunity* to present claimed violations of fundamental constitutional rights to the courts." *Id.* at 825 (emphasis added).

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[9] This does not mean that indigents are entitled to the full range of resources that would otherwise be available to a prisoner with resources. As this Court stated in *Ross v. Moffitt*, 417 U.S. 600, 616 (1974):

> [T]he fact that a particular service might be of benefit to an indigent defendant does not mean that the service is constitutionally required. The duty of the State under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process.

Thus, even indigents need not be provided with counsel for pursuit of discretionary review of a criminal conviction.

Bounds and its predecessors impose an added burden on state penal systems only because of this Court's legitimate desire to ensure that indigent prisoners have minimally adequate access to the courts.[10] Obviously, a non-indigent inmate with access to a lawyer has a "reasonably adequate opportunity" to present his case to the court in a *habeas* petition, a civil rights action or a civil forfeiture action.

The court of appeals simply ignored the fact that the "right of access" defined by this Court is inextricably tied to a concern with providing "reasonably adequate" legal services to *indigent* inmates. By ignoring the central premise of the right of access, the court of appeals has undermined completely the limiting principle of the *Bounds* decision, thereby leaving local governments virtually defenseless against inmate demands for legal assistance.[11] This Court should grant this petition in order to consider whether the right of access defined in *Bounds*

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[10] This Court recently noted that "denial of counsel to indigents on first appeal as of right amounted to unconstitutional discrimination *against the poor*." *Pennsylvania v. Finley*, U.S. 107 S. Ct. 1990, 1993 (1987) (emphasis added).

[11] The Eleventh Circuit's ruling also ignores the deference due to state and local officials who are charged with administering prisons. "Traditionally, federal courts have adopted a broad hands-off attitude toward problems of prison administration." *Procunier v. Martinez*, 416 U.S. 396, 404 (1974); *Block v. Rutherford*, 468 U.S. 576, 584-585 (1984). Indeed, state and local prisons "are subject to federal authority only where paramount federal constitutional or statutory rights supervene." *Johnson v. Avery*, 393 U.S. 483, 486 (1969). Even when those rights do supervene, courts give state and local officials latitude in fashioning a remedy. Thus, in *Bounds*, this Court noted that "a legal access program need not include any particular element we have discussed, and we encourage local experimentation." *Bounds*, 430 U.S. at 832.

The decision below, however, essentially holds that while the State may experiment, the prisoner decides. Any prisoner who elects not to employ counsel, certainly the most effective means of access to a court, may then demand a library or other "legal assistance" at the state's expense.

limits a non-indigent inmate's right to proceed *pro se* at the state's expense.

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS.

The decision below is in conflict with decisions in the courts of appeals in at least four other circuits. The Eleventh Circuit has held that the state cannot force an incarcerated individual to hire a lawyer "any more than the state can deny access to an indigent." App., *infra*, 5a. As Judge Hill noted in his concurring opinion, this decision "flatly overrule[d] *Wilson v. Zarhadnick*, 534 F.2d 55 (5th Cir. 1976)" which held that "[t]he state is under no duty to provide [prisoners] with legal materials at public expense" when they can afford counsel. 534 F.2d at 57.[12] In departing from *Wilson*, the Eleventh Circuit has thus placed itself in direct conflict with the Fifth Circuit.

The decision below also conflicts with the Fourth Circuit which has held that "we do not read *Bounds* to give an option to the *prisoner* as to the form in which he elects to obtain legal assistance." *United States v. Chatman*, 584 F.2d 1358, 1360 (4th Cir. 1978), *cert. denied*, 482 U.S. 911 (1979). In *Chatman*, an indigent defendant was offered—but declined—assistance of counsel at his trial. The court in *Chatman* declined to interpret *Bounds* to require the States to provide the defendant with access to a library after he had refused the assistance of counsel. The court stated that "to the extent . . . *Bounds* has any application to the instant case, the United States satisfied its obligation under the sixth amendment when it offered defendant the assistance of counsel which he declined." *Id.*; *see also Williams v. Leeke*, 584 F.2d 1336 (4th Cir. 1978), *cert. denied*, 442 U.S. 911 (1979)

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[12] The Eleventh Circuit adopted Fifth Circuit law as it existed on September 30, 1981 as binding precedent. *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc).

(states free to satisfy obligation under *Bounds* in a variety of ways). Thus, while a prisoner in the Fourth Circuit may elect to proceed *pro se*, the government is under no obligation to provide him with legal assistance, if he so selects.

The Ninth Circuit followed the Fourth Circuit's analysis in *United States v. Wilson*, 690 F.2d 1267, 1272 (9th Cir. 1982), *cert. denied*, 464 U.S. 867 (1983). In *Wilson*, the prisoner argued that the right of access under *Bounds*, combined with the right to proceed *pro se* under *Faretta v. California*, 422 U.S. 806 (1975), required that he be provided access to a law library to prepare a "meaningful" *pro se* defense. The Ninth Circuit rejected that contention and held that "[t]he offer of court-appointed counsel to represent Wilson satisfied the Fifth Amendment obligation to provide meaningful access to the courts." *United States v. Wilson, supra*, at 1272. The court noted that access to a law library is only one permissible means of obtaining meaningful access to the court. Access to the assistance of an attorney is also a permissible means of satisfying *Bounds*. Thus, "[w]hen such adequate access is provided, as was here, an inmate may not reject the method provided and insist on an avenue of his or her choosing." *Id.* at 1271, citing *Storseth v. Spellman*, 654 F.2d 1349 (9th Cir. 1981) (access to libraries is merely one of a number of means of satisfying *Bounds*).

Similarly, the Seventh Circuit, in *United States ex rel. George v. Lane*, 718 F.2d 226, 227 (7th Cir. 1983), held that if a pretrial detainee "is offered the assistance of appointed counsel and refuses the same, no constitutional right exists mandating that the prisoner in the alternative be provided access to a law library." In *Lane*, a prisoner had vacillated about whether to defend himself *pro se* or through appointed or private counsel. At the start of the trial he finally accepted counsel, but that attorney later became ill. Rather than accept another attorney, the defendant then elected to proceed *pro se*.

Following his conviction the defendant complained that he was denied access to a law library. After quoting from *United States v. Wilson, supra,* the court held:

> We agree with the Ninth Circuit and hold that the offer of court-appointed counsel to represent a defendant satisfies the constitutional obligation of a state to provide a defendant with legal assistance under the Sixth and Fourteenth Amendments.

United States ex. rel. George v. Lane, 718 F.2d at 231. Thus, "[a] state is not required . . . to offer a defendant law library access once it has fulfilled its constitutional obligation to provide him with competent legal assistance." *Id.* at 233; *Corgain v. Miller,* 708 F.2d 1241, 1250 (7th Cir. 1983) (refusing to read *Bounds* "as imposing a duty to provide [prisoners] with state law libraries [to research *habeas* claims] in the event that they chose not to accept adequate alternative services"); *Gometz v. Henman,* 807 F.2d 113, 116 (7th Cir. 1986) ("A prisoner with a lawyer on call may not also insist on assistance from fellow prisoners, for the entitlement is to adequate access, not to maximum possible access").

Thus, the Fourth, Ninth and Seventh Circuits have concluded that—even in a criminal trial—a defendant is not entitled to access to a law library or other assistance if counsel is made available to assist the defendant. If the defendant decides not to accept the offer of assistance of counsel, the government is under no obligation to provide additional or alternative methods of access to the courts.[13] Moreover, the Fifth Circuit clearly has held that an inmate who is not indigent is not entitled to

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[13] The Second Circuit reached a similar result in *Spates v. Manson,* 644 F.2d 80 (2nd Cir. 1981), with respect to criminal appeals. There the court held that while there is a right to proceed *pro se,* "this right does not carry with it a right to state-financed library resources where state-financed legal assistance is available." *Id.* at 85 (footnote omitted). Thus, a prisoner preparing his appeal may not insist on access to library materials.

have the state provide him with "legal materials at public expense." *Wilson*, 534 F.2d at 57. The necessary implication of these decisions is that an inmate who has the resources with which to employ counsel and thereby obtain fully adequate access to the courts has no right to forgo that option and insist on satisfying his right by proceeding *pro se* with access to a law library provided at state expense.

The opinion below is doubly worthy of review because, as Judge Hill noted in his concurrence, the majority "cavalierly expands the types of legal problems" for which an inmate may insist on state-supplied access to the courts. App., *infra*, 12A. Under the decision below, a non-indigent inmate may insist on access to a law library to pursue *any* civil claim. This holding extends the "right of access" far beyond the limits of the constitutional, civil rights and *habeas corpus* actions on which this Court focused in *Bounds*. See *Bounds*, 430 U.S. at 825, 827 (issue decided is whether inmates entitled to assistance in obtaining "adequate opportunity to present claimed violations of fundamental constitutional rights to the courts").

By extending the "right of access" to all civil cases, the court below overlooked the fact that the right has generally been applied only in those cases addressing the legality or conditions of confinement. *See, e.g., Nordgren* v. *Milliken*, 762 F.2d 851, 855 (10th Cir.), *cert. denied*, 106 S. Ct. 593 (1985); *In re Green*, 669 F.2d 779, 785 (D.C. Cir. 1981); *Crocker* v. *Mulligan*, 788 F.2d 809, 813 (1st Cir. 1986). The Eleventh Circuit, in effect, now requires state and local governments to provide litigation assistance to any non-indigent inmate who prefers to conduct his own civil litigation. The very existence of this right will almost certainly encourage some inmates to become more litigious.

Thus, the Eleventh Circuit has rejected the basic reasoning of the decisions of four courts of appeals on an

issue of tremendous practical importance to state and local governments. According to the decision below, the availability of counsel to a non-indigent does not satisfy the state's obligation to assure that inmates have a "reasonably adequate opportunity" to present their claims in court. Giving the decision a dictum label cannot change the fact that Florida, Georgia and Alabama (and every city and county in those States) must be ready to take on the burden of assisting non-indigent prisoners in *all types of legal proceedings*. Nor is this analysis changed by the fact that there are two alternative grounds for the holding, one of which is not worthy of this Court's review. The sole basis for the alternative ground was respondent's assumed indigency. Yet, respondent was not indigent, either at the time of his state criminal trial or his Section 1983 proceeding. A federal court should not be permitted to insulate its errors from this Court's review by refusing to ascertain the readily ascertainable fact that the respondent is not indigent. Had the Eleventh Circuit done its job in this respect there would be only one ground for its holding and that ground is clearly worthy of review by this Court.

This Court should grant this petition to resolve the conflict concerning when the Constitution requires inmates to be provided additional assistance in achieving access to the courts *beyond* the availability of counsel.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 2, 1987

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 86-3312

MICHAEL DENNIS STRAUB,
Plaintiff-Appellee,

v.

GEOFFREY MONGE,
as Sheriff of Sarasota County, Florida,
Defendant-Appellant.

MICHAEL DENNIS STRAUB,
Plaintiff-Appellee,

v.

THE CHAIRPERSON OF THE SARASOTA BOARD OF COMMISSIONERS, JIM HARDCASTLE, the Sheriff of Sarasota County, FL, *et al.*,
Defendants-Appellants.

May 5, 1987

Nelson Hesse, Cyril Smith, Widman & Herb, Richard E. Nelson, F. Steven Herb, Karen E. Atkins, Sarasota, Fla., for defendant-appellant.

Rahdert, Anderson & Richardson, George K. Rahdert, St. Petersburg, Fla., M. David Shapiro, Tampa, Fla., for plaintiff-appellee.

Appeal from the United States District Court for the Middle District of Florida.

Before HILL and HATCHETT, Circuit Judges, HENDERSON, Senior Circuit Judge.

HATCHETT, Circuit Judge:

This case requires that we determine the scope of *Bounds v. Smith*, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977). Finding that the district court correctly applied *Bounds*, we affirm.

On March 5, 1982, law enforcement officials in Sarasota County, Florida, arrested Michael Dennis Straub for robbery of the First Federal Bank of Fort Meyers, Florida. Following his arrest, criminal charges were filed against him, and he was incarcerated in the Sarasota County Jail where he remained until his transfer to the Florida State Prison system in September, 1982. Because Straub had used his automobile in the bank robbery, a felony, the state of Florida began civil forfeiture proceedings against the automobile.[1]

In the criminal case, the state trial court found Straub indigent and appointed the public defender for Sarasota County to represent him on the criminal charges. As to the civil forfeiture matter, because Florida law prohibited representation by the public defender, he had no lawyer. During a hearing in the civil forfeiture case, Straub requested permission to use the county law library. For some unknown reason, the state trial court never ruled on Straub's request to use the law library.

While incarcerated in the Sarasota County Jail, Straub continued his efforts to get access to legal materials in

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[1] Straub was personally named as a defendant in the civil forfeiture proceedings.

order to assist his lawyer in the criminal case and to prepare to defend himself and his automobile in the civil forfeiture case. Jail officials told Straub that he would have to obtain a court order to gain access to a law library. The record further indicates that Straub attempted to have written requests for access to a library filed with the court in order to obtain such a court order but for unknown reasons, these written requests never reached the court. Eventually, Straub entered a nolo contendere plea to the robbery charge which resulted in a judgment of guilty and a sentence of incarceration. The automobile was forfeited to the state of Florida.

PROCEEDINGS

Straub filed two cases in the district court pursuant to 42 U.S.C. § 1983, seeking damages, injunctive relief, and attorney's fees.[2] In both actions, Straub alleged that Sarasota County officials had denied him access to the courts in violation of his right to due process of law as provided by the fourteenth amendment to the Constitution of the United States.

The county officials contend that Straub had no constitutional right to access to a law library or legal materials in the criminal case because his appointed counsel provided him with meaningful access to the courts. As to the civil forfeiture case, the county officials contend that Straub was not denied access to the courts because he could have obtained a court order which would have provided him with the right to visit the county law library. The county officials also contend that Straub was not indigent; therefore, he could have hired a lawyer. Some effort was made in the district court to show that

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[2] In the first case, the defendants were Sheriff Jim Hardcastle and the state of Florida. The state of Florida was dismissed. In the second case, the defendants are Sheriff Jim Hardcastle, Max Frimberger, Captain of Sarasota County Jail, and the chairperson of the Sarasota County Board of County Commissioners.

certain inmates simply should not be allowed to use libraries.

The district court held that the policy requiring inmates to obtain a court order to gain access to legal materials was unconstitutional because the procedure itself required litigation. The district court characterized the county's procedure as "an unreasonable and unjustifiable catch-22 position of having to have access to the courts in order to obtain the legal materials necessary to show [an inmate] how to get access to the courts." As to the county's assertion that some detainees should not be allowed in a public library, the district court held that the burden should be on the county to obtain a court order preventing undesirable inmates from use of the library, rather than placing the burden on the inmates of seeking the court order. Rejecting all of the county officials' contentions, after a trial, the district court entered judgment for Straub in the amount of $3,000 plus costs and attorney's fees.

In this court, the county officials seek reversal of the district court's order arguing that Straub was not indigent and even if indigent, the county officials have qualified immunity foreclosing an award of damages.

DISCUSSION

After a full hearing, the district court found, as did the state court, that during Straub's detention in the Sarasota County Jail, he was indigent.[3] We may not disturb this factual finding unless the record indicates that the district court was clearly erroneous. *United States v. Koziy*, 728 F.2d 1314 (11th Cir.), *cert. denied*, 469 U.S. 835, 105 S.Ct. 130, 83 L.Ed.2d 70 (1984). The district court was not clearly erroneous. Consequently, if Straub is indigent, and if a court order is required to seek a court order, then, obviously, Straub has been denied

[3] The state trial court found Straub indigent in the criminal case.

access to the courts. We could stop. We go on because the district court ruled that even if Straub were not indigent, he was still entitled to access to the courts through the use of a library or other legal materials furnished by the county.

The county officials rely on *Wilson v. Zarhadnick*, 534 F.2d 55, 57 (5th Cir. 1976), in which the Fifth Circuit asked: "If a state prison inmate is not an indigent, if he has adequate financial resources with which to employ counsel of his own choice, is the state under a constitutional obligation to furnish the inmate with legal research material?" The Fifth Circuit answered that question in the negative. That was in 1976. In 1977, the United States Supreme Court decided *Bounds v. Smith*, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977). *Bounds* held that the fundamental right of access to the courts requires that prison authorities assist inmates in the preparation and filing of meaningful legal papers by providing adequate libraries or adequate assistance from persons trained in the law. In this case, the county officials misinterpret *Bounds* as applying only to indigent inmates. A reading of *Bounds* is sufficient: "[O]ur decisions have consistently required States to shoulder affirmative obligations to assure *all* prisoners meaningful access to the courts." *Bounds*, 430 U.S. at 824, 97 S.Ct. at 1496 (emphasis added); *see also Hooks v. Wainwright*, 775 F.2d 1433, 1435 (11th Cir. 1985). This statement, alone, explicitly rejects the contentions urged by the county officials. For sure the access issue has often arisen in situations where the inmates were indigent. The indigent will continue to be the most affected. But, as this case indicates, policies regarding library access may seriously affect an inmate who is not indigent. The state cannot force a person with financial means, who would otherwise not hire a lawyer, to hire a lawyer because of incarceration, any more than the state can deny access to an indigent. We hasten to add that

we are not holding that an inmate with the financial means to hire a lawyer must be furnished a lawyer at state expense. We do not now speak of representation, but access. The state may not bar access to the courts no matter what form it utilizes.

"Under *Bounds*, the government is *obligated* to provide prisoners "with adequate legal libraries or adequate assistance from persons trained in the law.'" *Mann v. Smith*, 796 F.2d 79, 83 (5th Cir. 1986) (quoting *Bounds*, 430 U.S. at 828, 97 S.Ct. at 1498) (emphasis added). "The constitutional guarantee of due process of law has as a corollary the requirement that prisoners be afforded access to the courts in order to challenge unlawful convictions and to seek redress for violations of their constitutional rights. . . . Regulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid." *Procunier v. Martinez*, 416 U.S. 396, 419, 94 S.Ct. 1800, 1814, 40 L.E.2d 224 (1974). "Of what avail is it to the individual to arm him with a panopoly of constitutional rights if, when he seeks to vindicate them, the courtroom can be hermetically sealed against him by a functionary who, by refusal or neglect impedes the filing of his papers?" *Ryland v. Shapiro*, 708 F.2d 967, 972 (5th Cir. 1983) (quoting *McCray v. Maryland*, 456 F.2d 1, 6 (4th Cir. 1972)). *See also Harris v. Pate*, 440 F.2d 315, 317 (7th Cir. 1971) (prison authorities prohibited from interfering with right of access to courts).[4] "[T]he State owes to each individual

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[4] Moreover, Florida law recognizes the affirmative duty placed on the state to provide affirmative assistance to inmates in their efforts to acquire meaningful access to the courts:

> All citizens in our state are also guaranteed access to our courts by article 1, section 21, Florida Constitution (1968). Although it is not necessary for us to provide affirmative assistance in order to ensure meaningful access to the courts to our citizens, as *it is necessary for us to do for those incar-*

that process which, in light of the values of a free society, can be characterized as due." *Boddie v. State of Connecticut*, 401 U.S. 371, 380, 91 S.Ct. 780, 787, 28 L.Ed.2d 113 (1971).

Bounds imposes an affirmative obligation upon the states to insure that "all prisoners" receive meaningful access to the courts and establishes no exception for non-indigent inmates. "[T]he right to a meaningful opportunity to be heard . . . must be protected against denial by particular laws [and policies] that operate to jeopardize it for particular individuals." *Boddie*, 401 U.S. at 379-80, 91 S.Ct. at 786-87. In *Cruz vI Hauck*, 627 F.2d 710 (5th Cir. 1980), the appellate court required the district court to determine whether *all* inmates at the jail had adequate access to the courts. *See also, Hooten v. Jenne, III*, 786 F.2d 692 (5th Cir. 1986). *Cruz* held that all inmates must in fact have access to the courts as mandated by *Bounds*. 627 F.2d at 721. "All prisoners . . . have court enforced access to legal research materials or assistance from persons trained in the law." *Hawthorne v. Wells*, 761 F.2d 1514, 1516 (11th Cir. 1985) (noting *Bounds*, 430 U.S. at 828, 97 S.Ct. at 1498).

We also note that the right to meaningful access to the courts, although routinely presented in constitutional and civil rights actions, is likewise applicable to the civil forfeiture action against Straub. Recently, the Fifth Circuit, in *Jackson v. Procunier*, 789 F.2d 307, 311 (5th Cir. 1986), rejected the proposition that "a prisoner's right of 'adequate, effective, and meaningful' access to the courts, as recognized by the Supreme Court in *Bounds*

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cerated in our state prison system, Bounds v. Smith, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977), we should not place any unnecessary restrictions upon that right.

The Florida Bar v. Brumbaugh, 355 So.2d 1186, 1192 (Fla. 1978) (emphasis added).

v. Smith, [footnote omitted] is limited to the presentation of constitutional, civil rights, and habeas corpus claims." The court held that "[r]ecognition of the constitutional right of access to the courts . . . long precedes *Bounds*, and has from its inception been applied to civil as well as constitutional claims." *Jackson*, 789 F.2d at 311.[5]

We agree with the district court's ruling regarding immunity. The right in this case is well established.

Accordingly, the district court order is affirmed.

AFFIRMED.

HILL, Circuit Judge, specially concurring:

Once we determined that the district court's determination of indigency was not clearly erroneous, we needed only to decide whether an indigent inmate, faced with defending himself in a civil forfeiture action brought by the state, who is not assisted by counsel in that defense, may be required to seek a court order before being allowed to use a law library. Because the majority opinion responds negatively to that query, I do not dissent. However, I am unable to concur in the majority's opinion.

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[5] The court in *Jackson* recalled that

> in *Chambers v. Baltimore & Ohio Railroad Co.*, [footnote omitted] the Supreme Court recognized this right of access in the context of a diversity tort suit, founding the right on the privileges and immunities clause, and stating: The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship . . . granted and protected by the federal constitution.' [Footnote omitted.]

Jackson, 789 F.2d at 311 (quoting *Chambers v. Baltimore & Ohio Railroad Co.*, 207 U.S. 142, 148, 28 S.Ct. 34, 35, 52 L.Ed. 143 (1907)).

By addressing the issue of access to non-indigents, in a case where the prisoner was found indigent, the majority unnecessarily expands the holding of this case. The district court supported its opinion on alternative grounds out of an abundance of caution. Had we found the finding of indigency clearly erroneous, it would have been necessary to address the alternative holding. We did not so find, thus our task is finished. We need not address issues based on a hypothetical situation.

I would like to dismiss the second part of the majority opinion as harmless dicta. However, the majority does not treat it as such, and I am concerned that it will not be read as such. Thus, I feel compelled to write separately, and point out that the majority expands *Bounds'* holding in two important ways, neither of which is justified by the facts of this case.

First, the majority flatly overrules *Wilson v. Zarhadnick*, 534 F.2d 55 (5th Cir. 1976). It claims that this action is required by a simple reading of *Bounds*. I do not find the issue so clear. It is true that *Bounds*, and subsequent decisions in the circuit courts, have required that the states "assure *all* prisoners meaningful access to the courts." *Bounds*, 430 U.S. at 824, 97 S.Ct. at 1496 (emphasis added). *See also Hawthorne v. Wells*, 761 F.2d 1514 (11th Cir. 1985); *Cruz v. Hauck*, 627 F.2d 710 (5th Cir. 1980). However, when the majority states, "the state cannot force a person with financial means, who would otherwise not hire a lawyer, to hire a lawyer because of incarceration, any more than the state can deny access to an indigent," it breaks new ground. This proposition does not relate to the words "all prisoners." In truth, it redefines "meaningful access." According to the majority opinion, not only must a prisoner have access to the courts, he must also have the choice between hiring an attorney and proceeding *pro se*—the latter at state expense.

The economic and logistical problems imposed by the majority's expansion of *Bounds* should not be taken lightly. While it may not be difficult for a federal prison with a large library to provide all inmates with access to it, many state-run jails, such as the one that confined Mr. Straub, are not equipped with such facilities. Under the majority view, state authorities must either finance a complete library or surmount the logistical and security related problems of transporting inmates to public libraries.

These considerations have been taken into account by other federal courts when limiting *Bounds'* impact in a slightly different context. At least three circuit courts have held that where an indigent criminal defendant refuses court-appointed counsel, the state does not have an obligation to give him access to a law library so that he may proceed *pro se*. In so holding, the Fourth Circuit Court of Appeals explained, "We do not read *Bounds* to give an option to the *prisoner* as to the form in which he elects to obtain legal assistance." *United States v. Chatman*, 584 F.2d 1358 (4th Cir. 1978) (emphasis in original). *See also United States ex rel. George v. Lane*, 718 F.2d 226 (7th Cir. 1983); *United States v. Wilson*, 690 F.2d 1267 (9th Cir. 1982); *cf. Hooks v. Wainwright*, 775 F.2d 1433 (11th Cir. 1985) (*Bounds* does not require that the state provide both access to a law library and assistance from "persons trained in the law").

The question here is also whether "meaningful access" means that the state must bear the burden of an incarcerated inmate's "choice" to proceed *pro se*. Allowing economics into the equation is not an impermissible step. The Supreme Court in *Bounds* was careful to note:

> This is not to say the economic factors may not be considered, for example, in choosing the methods used to provide meaningful access. But the cost of protecting a constitutional right cannot justify its

> total denial. Thus, neither the availability of jailhouse lawyers nor the necessity for affirmative state action is dispositive of respondents' claims. The inquiry is rather whether law libraries or other forms of legal assistance are needed to give prisoners a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts.

With this in mind, I submit that "meaningful access" need not be interpreted as broadly as the majority suggests. In fact, *Bounds* may be interpreted to mean that states are required to fill in the gaps, and provide access to those prisoners who would otherwise not have access, thus making sure that "all" prisoners do have access. Such an interpretation of *Bounds* is not as implausible as the majority opinion implies. As we noted in *Hooks v. Wainwright*:

> *Bounds* was a limited decision. At the time it was decided, *Bounds* was the culmination of a series of cases holding that imprisonment should not deprive persons of access to courts. . . .
>
> All of these decisions simply removed barriers to court access that imprisonment or indigency erected. They in effect tended to place prisoners in the same position as nonprisoners and indigent prisoners in the same position as nonindigent prisoners. Having held that inmates can represent themselves, if able to do so, and can help other inmates who are not so able, it was but a small step to hold that such able inmates, who presumably would have access to libraries but for imprisonment, must be given access to libraries or prison, or access to people who have access to libraries.

Id., 775 F.2d at 1436.

The Supreme Court decision in *Bounds*, then, may be seen as an equalizer. It requires that access be given

where none was available. This does not mean, necessarily, that a prisoner with ample financial resources to retain a lawyer has insufficient access to the courts unless he or she also has access to a law library. The state may not yet have to provide everyone sued or indicted with a full set of law books in case he or she might wish to proceed *pro se*.[1] The simple fact is that the *Bounds* court did not address the indigency issue, and neither should we, until we are presented with a case which contains the necessary factual predicate for overruling *Wilson*.

Second, I object to the majority's opinion because it cavalierly expands the types of legal problems for which access to court system [sic] must be available. In *Bounds*, and every prior Supreme Court case regarding court access, the court only struck down those barriers which kept indigent prisoners from filing habeas corpus petitions, suits challenging the conditions of their confinement, or civil rights claims.[2] In the *Bounds* opinion

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[1] Some restrictions on access to the court system are impermissible even though the affected prisoner already has an attorney. For example, in *Procunier v. Martinez*, 416 U.S. 396, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974), the Supreme Court struck down a California regulation barring law students and paralegals, who were employed by the inmates' attorneys, from visiting the prisoners. A regulation inhibiting private legal counsel from effectively assisting prisoners varries very little justification. However, invalidating such an unjustified restriction is a far cry from requiring that the state provide all inmates with a library in all instances.

[2] In *Ex parte Hull*, 312 U.S. 546, 549, 61 S.Ct. 640, 641, 85 L.Ed. 1034 (1941), the court struck down a regulation prohibiting the filing of habeas corpus petitions until the parole boards "legal investigator" had determined that they were "properly drawn." In *Griffin v. Illinois*, 351 U.S. 12, 16-20, 76 S.Ct. 585, 580-591, 100 L.Ed. 891 (1956), the court held that trial records must be provided to inmates unable to pay for them. *Burns v. Ohio*, 360 U.S. 252, 257-58, 79 S.Ct. 1164, 1168, 3 L.Ed.2d 1209 (1959), held that indigent prisoners must be permitted to file appeals in habeas corpus petitions without paying docket fees. *Johnson v. Avery*, 393 U.S. 483, 490, 89 S.Ct. 747, 751, 21 L.Ed.2d 718 (1969), invalidated prison regulations which prohibited inmates from assist-

itself, the Supreme Court noted that the right to access cases focus mainly on constitutional and civil rights claims. The court stated:

> [I]n this case, we are concerned in large part with original actions seeking new trials, release from confinement, or vindication of fundamental civil rights. Rather than presenting claims that have been passed on by two courts, they frequently raise heretofore unlitigated issues. As this court has "constantly emphasized," habeas corpus and civil rights actions are of "fundamental importance . . . in our constitutional scheme" because they directly protect our most valued rights. (citations omitted).

Bounds, 430 U.S. at 827, 97 S.Ct. at 1498.

The former Fifth Circuit was never asked to apply *Bounds* outside this narrow range of cases.[3] In *Cruz v.*

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ing one another with habeas corpus petitions. In *Younger v. Gilmore*, the Supreme Court affirmed a three-judge district court opinion invalidating California prison regulation which restricted prisoners' access to legal books. However, this case also arose in the context of allowing inmates to draft habeas petitions and civil rights claims. *Gilmore v. Lynch*, 319 F.Supp. 105, 110 (N.D.Cal. 1970), *aff'd sub nom., Younger v. Gilmore*, 404 U.S. 15, 92 S.Ct. 250, 30 L.Ed.2d 142 (1971) (per curiam). In *Wolff v. McDonnell*, 418 U.S. 539, 578-80, 94 S.Ct. 2963, 2985-86, 41 L.Ed.2d 935 (1974), the Supreme Court extended *Johnson v. Avery* to civil rights actions, holding that prisoners must be allowed to assist each other in drafting civil rights complaints, as well as habeas petitions.

[3] The former Fifth Circuit did address the issue in a few pre-*Bounds* decisions. In one, *Andrade v. Hauck*, 452 F.2d 1071, 1072 (5th Cir. 1971), we held that "every prisoner has a constitutional right of access to the courts to present any complaint that he might have concerning his confinement." The court did not attempt to define the parameters of meaningful access. In another decision, handed down one week before *Bounds*, we concluded that prisoners must be allowed to render each other assistance in legal matters "including but not limited to divorce, and small civil claims." *Corpus v. Estelle*, 551 F.2d 68, 70 (1977). Although *Corpus* did apply the "meaningful access" concept to the civil arena, neither

Hauck, 627 F.2d 710, 721 (5th Cir. 1982), the former Fifth Circuit cited *Bounds* for the proposition that all inmates must have access to the courts for the filing of "federal habeas corpus or state or federal civil rights actions." (citing *Bounds* at n. 17). In *Bonner v. City of Prichard, Alabama*, 661 F.2d 1206 (11th Cir. 1981), this court similarly noted:

> "prisoners have a constitutional right to 'adequate, effective and meaningful' access to the courts. *See Bounds v. Smith*, 430 U.S. 817, 822 [97 S.Ct. 1491, 1495, 52 L.Ed.2d 72] (1977) [additional citations omitted]. This right is well established both in habeas corpus actions . . . and in civil rights cases. . . ." [Additional citations omitted].

Id. 661 F.2d at 1212. In another recent case, we noted in dicta that many procedural steps have been taken to ensure access to the courts for "the benefit of the prisoner who in a custodial setting has been deprived of a constitutional right." *Hawthorne v. Wells*, 761 F.2d 1514, 1516 (11th Cir. 1985). Indeed, the new Fifth Circuit, in discussing the *Bounds* decision, explained:

> In *Bounds* the court held that prisoners have a constitutional right of adequate, effective and meaningful access to the courts. . . . Apparently, the right is not extended to all legal filings, but applies only to presentation of constitutional claims, such as civil complaints and state and federal habeas petitions. *Id.* [*Bounds*] at 825, 827-28 and n. 17 [97 S.Ct. at 1496, 1497-98 and n. 17].

Morrow v. Harwell, 768 F.2d 619 (5th Cir. 1985).[4] To apply *Bounds* outside this context is a bold extension of

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of these cases addressed the extent to which the state must finance inmates' "meaningful access" to the courts.

[4] *See also Hooten v. Jenne*, 786 F.2d 692 (5th Cir. 1986) (applies *Bounds* in civil rights context); and *Mann v. Smith*, 796 F.2d 79

the principles expounded by the Supreme Court in its right to access decisions.

As the majority rightly notes, the New Fifth Circuit recently dismissed *Morrow's* interpretation of *Bounds* as "obiter dicta," and held that "although *Bounds* did not discuss civil suits," the Fifth Circuit would henceforth apply *Bounds* to prisoners involved in civil cases unrelated to their confinement. *Jackson v. Procunier*, 789 F. 2d 307 (5th Cir. 1986). Finding this an admirable step, today the majority adopts the holding of *Procunier* for the Eleventh Circuit. This goes well beyond what is necessary to decide this case.

Some extension of *Bounds* is necessary in order to support the district court's judgment regarding Mr. Straub's right to access to the courts, for his case falls outside the usual *Bounds* context. We are not dealing with a prisoner who wants to draft a civil rights complaint or a habeas petition. Instead, we are dealing with an indigent pretrial detainee who was faced with defending himself in a civil forfeiture action brought by the state. However, we may extend *Bounds* to cover Mr. Straub's situation, without adopting the holding of *Procunier*, by limiting our holding to the facts presented by Mr. Straub's case.

This limited extension of *Bounds* is a smaller step, and is fully justified by the facts of this case and prior prece-

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(5th Cir. 1986) (applies *Bounds* to prisoner's civil rights claim). The panel in *Mann* aptly described the nature of the beast when it stated:

> As we pointed out in *Morrow*, the principles stated in *Bounds* "suffer for lack of internal definition and prove far easier to state than to apply," perhaps because they have no clear textual footing in the Constitution. 768 F.2d at 623. *Bounds* is vague about exactly what kinds of claims by inmates trigger the "right to access" to the courts, how long a person must be detained before the right is triggered, and what level of legal assistance is required to protect the right.

Id. 796 F.2d at 84.

dent. A defendant in a civil forfeiture proceeding and a habeas corpus petitioner (or civil rights complainant challenging the conditions of confinement) both have the state as their adversary. Both must have meaningful access to the court system if they are to protect their interests—liberty or property—from continued harm. The Supreme Court has already held that the exclusionary rule, which normally only relates to criminal matters, must apply in civil forfeiture proceedings. *Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 85 S.Ct. 1246, 14 L.Ed.2d 170 (1965). This extra protection was considered necessary because of the quasi-criminal nature of such proceedings. Prisoners who file post-conviction claims for relief are also challenging criminal proceedings. Thus, Mr. Straub's case has much in common with the type of constitutional and civil rights cases that the Supreme Court was concerned with in *Bounds*, an application of the principles espoused therein to Mr. Straub is justified. I do not wish to apply *Bounds* to every conceivable legal problem, whether the inmate is proceeding as a plaintiff or a defendant; I see no limiting factor in the majority opinion.

Of course, in a certain sense, Mr. Straub was guaranteed "access" to court because he was a defendant. In fact, he was being haled into court whether he wanted to be there or not. To this extent his predicament was analytically distinct from that of *pro se* plaintiffs, who are the types of litigants dealt with in the *Bounds* line of cases. Yet, as expressed above, Mr. Straub was faced with the same adversary. *In this type of case*, "meaningful access" must mean the ability to prepare oneself when one cannot afford counsel. Requiring an inmate to obtain a court order before being allowed to use a library, even where he must use a public library, is an impermissible restriction on that right. To the extent the majority so holds, I decline to dissent: but we ought not go further beyond *Bounds*.

I do not intend that my concurrence be read as a prediction of how I would decide the issues discussed above, were they appropriately presented in a case with the necessary factual predicate. I write merely to explain how the majority opinion goes far beyond *Bounds* in two distinct respects, in a situation where we are not called upon to address these issues. The second part of the majority opinion can easily be read to give every prisoner the right to access to a law library for every perceived legal problem, whether or not he can afford legal counsel.[5] In this I cannot concur.

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[5] As we noted in *Corpus v. Estelle*, 551 F.2d 68 (5th Cir. 1977), programs which provide meaningful legal assistance to inmates beyond that which is required by law are to be commended. I object only to the notion that states are required to finance a legal library capable of giving every prisoner "meaningful access to court" for every perceived legal problem, whether or not a given prisoner can afford an attorney.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 82-589-Civ-T-15

MICHAEL DENNIS STRAUB,
Plaintiff,

vs.

GEOFFREY MONGE,
as Sheriff of Sarasota County, Florida,
Defendants.

MICHAEL DENNIS STRAUB,
Plaintiff,

vs.

THE CHAIRPERSON OF THE SARASOTA COUNTY BOARD OF COUNTY COMMISSIONERS, *et al.*,
Defendants.

CONSOLIDATED

[Filed March 19, 1986]

MEMORANDUM OPINION

These consolidated cases were brought under 42 U.S.C. § 1983 and they came to trial on the claim that the plaintiff was denied meaningful access to the courts while he was a detainee at the Sarasota County Jail, Sarasota,

Florida during the period of March through July, 1982. The complaints were drafted by the plaintiff who represented himself through most of the years of this litigation. Late in the pretrial proceedings the plaintiff found counsel who would represent him at trial and he was represented by counsel at the two-day trial held March 10-11, 1986.

The plaintiff seeks an award of damages for emotional distress and mental anguish associated with the deprivation of a substantive constitutional right and also seeks an award of attorneys fees for the attorneys who brought the case to trial. For the reasons set forth herein the Court concludes that the plaintiff was denied meaningful access to the courts while attempting to defend a forfeiture action during his detention at the Sarasota County Jail and that he has suffered emotional distress and mental anguish as a result of that deprivation.

On March 5, 1982 Michael Dennis Straub, hereinafter "Straub," was arrested for the armed robbery of the North Port Office of the First Federal Bank of Fort Myers, Florida. When Straub was taken into custody the police also took custody of his automobile. Shortly after his arrest the State of Florida instituted its criminal prosecution of Straub and, later, began civil forfeiture proceedings to acquire title to his automobile because it was used in the commission of a felony. The criminal proceedings were styled *State of Florida v. Michael Straub* and the civil forfeiture proceeding, somewhat peculiarly, was styled *State of Florida v. One 1978 Datsun 4-Door Sedan and Michael D. Straub.*

The style of the civil forfeiture was peculiar because a forfeiture proceeding normally is brought in rem and the claimant (i.e., owner, here Straub) is not named as respondent but only enters the litigation if he claims some interest in the property. The inclusion of Straub as a respondent in the civil forfeiture is of interest in this case because as a party, notwithstanding the legitimate

interest Straub would have had in litigating as a claimant, it is reasonable that Straub had an even heightened interest in the civil forfeiture. It also is reasonable to conclude from the evidence that Straub, a lay person untrained in the law, was ignorant of the legal and procedural implications of a civil forfeiture proceeding.

At the time of his detention in the Sarasota County Jail facilities Straub was judicially determined to be indigent and from the time of his initial appearance in the criminal proceedings he was represented by court appointed counsel, The Public Defender for Sarasota County. However, the public defender did not, and in fact was not allowed to, represent or even advise Straub with regard to the separate but related civil forfeiture proceedings.

Prior to his criminal trial Straub was brought to trial on the civil forfeiture action, a proceeding having penal overtones, and in this particular case the same state's attorney was functioning as prosecutor in the criminal proceeding and state's attorney in the civil forfeiture. These are yet further peculiar twists to the facts of this case because many of the same issues that arise in a criminal proceeding can, and often do, arise in the context of the related forfeiture. The customary procedure is that the criminal charge is tried first and, in a sense, lays the foundation for the forfeiture. One important issue in both the forfeiture proceeding and the criminal proceeding is whether or not a felony was committed. The procedure followed with respect to Straub raises due process questions beyond the claims in this case but the scenario does support the conclusion that Straub had a very legitimate reason for wanting access to legal resources to prepare himself for the civil forfeiture case.

Straub did not become aware of the civil forfeiture proceeding until June, 1982, when he was told that the State intended to take his automobile. However, even then he did not fully understand the workings of a civil

forfeiture. On July 8, 1982 he was taken from a jail to a hearing, and was informed by the judge that a final hearing on the civil forfeiture would take place on July 21, 1982. Straub was not represented by counsel at any of the forfeiture proceedings but he did request access to the law library. The judge did not rule on his request and Straub never gained any meaningful access to legal materials. The automobile was forfeited to the State on July 21, 1982, prior to Straub's criminal trial.

Denial of Access

From very early on in his detention Straub sought meaningful access to legal materials and to the courts. He wanted such access so that he could assist his counsel in the criminal case and so that he could represent himself in the civil forfeiture proceedings. Straub frequently asked jail officials to allow him access to a law library and such requests were made orally and in writing to persons responsible for his detention. Invariably, he was told to get a court order. Straub attempted to the best of his ability to file motions with the courts and gave such legal correspondence to jail officials for mailing but for some unknown reason most such materials never reached the court and no court ever provided Straub with the needed order. Straub even asked relatives to bring legal materials to him and at least one relative brought him photocopies of legal materials to the jail but they never reached him. During his period of detention at the Sarasota County Jail, Straub was denied meaningful access to the courts in attempting to defend the forfeiture action because access to a law library or use of adequate legal materials was denied him, and with respect to his civil forfeiture proceeding, such denial constituted a clear violation of a known constitutional right. *See Bounds v. Smith*, 430 U.S. 418 (1977).

Analysis of the Defenses

Throughout this litigation the defendants contended that Straub had no constitutional right to access to a law

library or legal materials for the purpose of assisting his counsel in the criminal case because his apopinted counsel provided him with meaningful access to the courts. With regard to the criminal case, the Court agrees with the defendants and finds no denial of plaintiff's right to access to the courts in that case.

As to the issue of Straub's right to meaningful access to the courts with regard to civil matters, primarily his civil forfeiture, the defendants have taken the position that Straub was not denied access because he could have gone to the law library had he gotten a court order as was required by jail policy and, most recently, they have argued that Straub was not deprived of any constitutional right because he really was not indigent and should have hired private counsel for the civil forfeiture.

During the time when Staub was detained at the Sarasota County Jail that facility had no law library or other means of providing detainees with legal materials in the jail but, seemingly, procedures were in place to take detainees to a county law library provided the detainee got a court order allowing him to go to that facility. Under that procedure the burden was on the detainee to file a motion with the local circuit court requesting an order telling the jail officials to take him to a library. The defendants stated that they generally would not oppose a motion for access to the law library but stated that a court order was necessary to give them authority to take a detainee from the jail to the library which was a public facility. The defendants admitted that there was no procedure in place for showing or otherwise informing the detainee how to go about getting a court order and that no one on staff at the jail provided any such assistance. Moreover, there was no mechanism in place for providing any legal materials to detainees who for whatever reason could not gain access to the law library.

The policy of the Sarasota County Jail with respect to access to the courts cannot withstand constitutional scru-

tiny. First, the policy and procedures place the detainee in the position of having to litigate in order to gain meaningful access to the courts when such access is his constitutional right. Second, from a practical standpoint, given the fact that most lay persons are untrained in the law, the policy places the detainee in an unreasonable and unjustifiable catch-22 position of having to have access to the courts in order to obtain the legal materials necessary to show him how to get across to the courts.

The defendants suggest that a court order is a reasonable requirement because some detainees should not be allowed in a public law library and they suggest that Straub may have been one such detainee because his defense to the armed robbery charge was that he suffered from post traumatic stress disorder (PTSD) as a result of his experience in Vietnam and a PTSD defense is a form of an insanity defense. The Court does not find fault in the suggestion that some detainees may not be appropriate for trips to the public law library but if that is the problem the State should have the burden of seeking a court order denying such access rather than force all detainees to seek court orders to gain access. Moreover, some reasonable meaningful alternative access must be provided to those who are denied access to the library. If the county wishes to save the expense of providing a law library within the detention facility then it must make certain that all detainees have meaningful access to legal materials from some other source and must not set up arbitrary and unreasonable hurdles, such as a court order requirement, that only discourages detainees and frustrates their lawful efforts. The defendants' blind adherence to the flawed access policy that they set in place was not warranted.

With regard to the defendants' argument that Straub really was not indigent when he was at the Sarasota County Jail the Court notes that he was judicially determined to be indigent at that time and that there is

no basis for concluding that such determination was incorrect. Defense counsel spent much of the trial trying to prove that Straub had certain income during 1982 and that he therefore was not indigent and must have lied about his income to the state court judge in order to get a public defender. Defense counsel even went so far as to make the rather cynical assertion that Straub was contributing too much money to the support of his wife and children, money which could have been used by him to hire counsel. Although the Court does note that Straub was not the most credible of witnesses on the issue of his income at various times, the defense has not shown that he lied to the state court judge or even that that judge was unaware of his income. As plaintiff's counsel pointed out, income is only one factor in a determination of indigency and it is certainly plausible that the state court judge appointed counsel for Straub despite the fact that he was receiving disability benefits from the Veterans Administration in the range of $1,200 per month. There is no doubt that Straub's unusual family situation and obligations would have entered into such a determination. The Court concludes that Straub was indigent during his detention in Sarasota County, that is, he did not have the resources necessary to retain private counsel. The Court further notes that Straub did seek assistance from legal aid groups but that such assistance was denied him because the defense of civil forfeiture actions were not within the priorities of those organizations.

It is worth noting that Straub's financial status in fact played no part in the defendants' decisionmaking or policy making in 1982 that caused the denial of access in this case. The "non-indigency" defense did not arise in this case until this Court took away Straub's indigency status a few months before the trial. In doing so this Court took way his right to proceed without court costs and fees. The Court has not made the kind of indigency determination about Straub in this case that the state

court judge would have made in appointing counsel for him.

The "non-indigency defense" has surfaced because defense counsel contends that the state does not have to provide meaningful access to the courts to inmates who are non-indigent because they should retain private counsel. The defendants rely on *Wilson v. Zarhadnick*, 534 F.2d 55 (5th Cir. 1976) for the proposition that the state's constitutional burden of providing access to the courts depends on the detainees indigency status. Assuming, for the sake of argument only, that this Court had found that Straub was not indigent while he was at the Sarasota County Jail the Court would decline to follow *Wilson* for at least three reasons. First, the holding of *Bounds* is not susceptible to a fair interpretation that such discrimination between detainees based on wealth is allowable. Second, the portion of *Wilson* dealing with indigency status appears to be in the nature of dicta as it seems that aspect of the case was not developed in the lower court. Third, such distinctions simply are not workable. The logical extension of the defendants' argument is that some person or persons would decide which detainees are indigent and allow only those inmates access to a law library or legal materials while telling non-indigent inmates they must hire an attorney if they want access to the courts. Such a policy would be an administrative disaster area and only provide one more issue for a prisoner to litigate about, i.e., indigency status, for which litigation he would require meaningful access.

Qualified Good Faith Immunity

The defendants have raised the defense of qualified good faith immunity. However, the evidence in this case does not support such a claim of immunity. The constitutional right that was denied by these defendants was a clearly established one and one which a reasonable jailkeeper would have known. Moreover, it is clear from the evidence in this case that the defendants in fact knew that detainees have a constitutional right to meaningful

access to the courts and that such meaningful access includes access to legal resource materials.

Damages and Attorneys Fees

The evidence in this case supports a claim for damages. Considering all of the circumstances and the plaintiff's testimony the Court concludes that he suffered actual injury in the form of mental anguish and emotional distress as a result of the defendants' repeated denials of his right to meaningful access to the courts and to legal materials in regard to his civil suit. The nature of the injury, including the fact that the deprivation in this case was ongoing over a considerable period of time warrants an award of damages to the plaintiff in the amount of $3,000 and costs of this action. Although failing to sustain the claim as to plaintiff's criminal proceeding, plaintiff's counsel have prevailed on the claim as to the forfeiture action and are entitled to an award of reasonable attorneys fees.

Having considered the foregoing, it is

ORDERED:

1. That the Clerk shall enter final judgment for the plaintiff and against the defendants in the amount of $3,000 plus costs of this action.

2. That within fifteen days of this opinion counsel for the parties shall meet and confer in an effort to stipulate to a *reasonable* attorneys fees award in this case. If counsel are unable to reach some amicable accord on the fees issue the Court will accept briefs and affidavits on the fees award after thirty days from this opinion.

DONE AND ORDERED at Tampa, Florida this 19th day of March, 1986.

/s/ William J. Castagna
WILLIAM J. CASTAGNA
United States District Judge

Copies to
Counsel of Record